No. 3046.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

William B. Edwards,
Appellant,

vs.

Patrick Bodkin,
Appellee.

BRIEF OF APPELLEE.

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STATEMENT.

This is an attempted appeal by appellant from a judgment of the United States District Court at Los Angeles, Honorable Benjamin F. Bledsoe presiding, sustaining a demurrer to the amended complaint, without leave to amend. The amended complaint is a long, confusing recital of the vicissitudes of the appellant in losing his contest before the various land departments of the government over a period of years and an

attack made upon the decisions of the land office for the purpose of having it held that appellee's patent heretofore issued by the government at the conclusion of all the contests should be cancelled and a patent issued to appellant.

First Proposition.

The appeal should be dismissed for the failure of appellant in the following particulars:

1. A failure to comply with section (1) of rule XXIV as amended March 29, 1916, by this Honorable Court, in that no printed brief has been served and filed as required by that rule, and further, that no concise, abstract statement of the case is presented in any brief by appellant, and in that no specification of errors relied upon are stated as required by said rule and the subdivisions thereof.

2. No citation has been issued and served in this case as shown by the records and files of this cause.

A reference to the record in this cause will show the failure of appellant to comply with the rules of this Honorable Court in the above particulars; and the record presented, being unintelligible on its face, should be dismissed by this Honorable Court.

Second Proposition.

The action of the court in sustaining the demurrer without leave to amend was right.

In this connection we call attention to the opinion of the United States District Court at Los Angeles, rendered on the dismissal of the complaint, and which is

reported in 241 Fed. R. 931, and which, omitting formal parts, is as follows:

"By amended bill of complaint in equity plaintiff alleges, among other things, that on July 17th, 1902, the Secretary of the Interior, under the 'second form' of withdrawal under the 'Reclamation Act' of June 17th, 1902, withdrew a certain quarter section lying along the Colorado River in California. On the 1st of December following plaintiff made a homestead entry of said land. Thereafter, in September, 1903, the Secretary of the Interior made a 'first form' withdrawal of the quarter section above referred to.

In 1905 the Department of the Interior promulgated certain regulations respecting withdrawals under the Reclamation Act (33 L. D. 607), providing for the entertaining of contests as to lands withdrawn pursuant to either form of withdrawal under the Reclamation Act and also providing that the preferred right of a successful contestant under the Statute of 1880 (21 Stat. 140) would be held to attach at any time 'within 30 days from notice that the lands involved have been released from such withdrawal and made subject to entry.'

Thereafter, under the provisions of these regulations, defendant contested the entry of plaintiff in May, 1908. The decision of the local land officers was adverse to plaintiff and on appeal was sustained by the department, and the entry of plaintiff was cancelled April 19th, 1909. On May 18th, 1910, pursuant to order of restoration of January 10th, 1910, the land was released from every form of reclamation withdrawal and restored to entry.

Thereafter, on May 18th, 1910, plaintiff and defendant filed applications for the entry of such land. Because of matters not necessary to be detailed here, decision on such applications was withheld until June, 1912, at which time plaintiff's application was rejected and defendant's application, because of the preferential right inuring to him in virtue of his successful contest, was accepted. Upon appeal this was sustained. A rather succinct statement of the facts in the controversy will be found in Edwards v. Bodkin, 42 L. D. 172, 174.

Plaintiff also alleges the initiation and pendency of certain ejectment proceedings in the Superior Court of Riverside county, the county in which the land was situate, resulting adversely to him, in consequence of which he was ejected from the land.

It is also alleged, beginning with paragraph 51 of the complaint, that defendant, claiming other land by homestead, relinquished his homestead entry on the land in question in 1914 and thereupon offered scrip locations on the same land and asked for acceptance of the same. Plaintiff then alleges 'that, exercising his lawful privilege of protest, plaintiff duly filed with the Registrar and Receiver his written protest, under oath, against the allowance of said scrip locations, on or about April 1st, 1914.' Subsequently the scrip locations of the defendant were accepted by the department and patents of the United States in response thereto were issued. Wherefore plaintiff asks that the defendant be declared a trustee of said property, holding said patents for his use and benefit, etc.

Memorandum Opinion.

Bledsoe, district judge: In this case plaintiff, who appears in *propria persona,* has imposed considerable labor upon the court because of the undue prolixity with which he has clothed both his complaint and his argument in support thereof. However, the court has endeavored, as best it might, to give all of the matters submitted to it the very careful consideration which their importance, to the parties, at least, demand.

Without going into a lengthy statement either of facts or conclusions, because of pressure of other duties, it will suffice to say that plaintiff presents, as I see it, two reasons why defendant should be declared to be a trustee for him of the land heretofore patented by the United States. First, that the Department of the Interior, without right and contrary to law, extended the so-called preference right of defendant, earned after successful termination of contest, beyond the thirty-day period provided by the statute (21 Stat. at L. 140), so as to entitle defendant to have and take advantage of such preferential right after a restoration from withdrawal of the lands affected; and secondly, that in spite of the protest of plaintiff, upon relinquishment and location by scrip of the lands in controversy, the land department fraudulently and without right overruled plaintiff's claims and allowed the aforesaid scrip location of the defendant.

It is Hornbook law that in a case of this sort the function of the court is not to sit in judgment as a court of appeal upon the conduct or conclusions of the Department of the Interior respecting a disposal of

public lands. Its jurisdiction is limited to a correction of errors such as is peculiarly the province of a court of equity where fraud has supervened, or to correct what may be shown to the court to be a manifest misconstruction of the law by the officers of the department. Within the domain of fact, in the absence of extrinsic fraud, the conclusions of the department are not susceptible to collateral attack. So. also, 'where fraud and misrepresentation are relied upon as grounds of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily affect the action of the officers in the department. Mere general allegations of fraud and misrepresentations will not suffice. (Quinby v. Conlan, 104 U. S. 420.)

The allegations of plaintiff with respect to fraud perpetrated upon him and the alleged unlawful overruling of his protest of the allowance of the scrip location, are not made with such particularity of detail as to show either that any fraud was actually committed or that any mistake of law in the overruling of plaintiff's protest was indulged in. *Non constat* no ground may have been set up in plaintiff's protest against the allowance of the scrip location sufficient to authorize or justify the department in sustaining it. Assuredly no particulars of fraudulent conduct are alleged and nothing but the most general and inconclusive assertions with respect to fraud are indulged in.

The main question in the case centers around the right of the Department of the Interior to allow the preferential right inuring to the successful contestant

of an entry upon public lands to attach and be taken advantage of after the lands have been restored to entry subsequent to a 'first form' withdrawal under the Act of June 17th, 1902 (32 Stat. at L. 388). The department in several apparently well considered decisions has held that such right obtains (Fairchild v. Eby, 37 L. D. 362; Beach v. Hansen, 40 L. D. 607; Wright v. Francis, 26 L. D. 499; Edwards v. Bodkin, 42 L. D. 172), and this court is not prepared to hold that there is such a manifest disregard of the law exhibited by those holdings as to warrant interference in plaintiff's behalf.

It must be conceded that the statute of 1880 gave to a successful contestant a substantial statutory right —the right to enter the land which was the subject of the successful contest. In order that evasions of the law might be prevented and frauds upon the government avoided it was both necessary and proper that this statutory right and privilege should be given due recognization and that it should be accorded a liberal construction in the administration of the land laws. It was intended to act as a preventive of frauds upon the government and intended to reward those who were diligent in exhibiting the facts of such fraud to the government. It may have been that, with respect at least to 'first form' withdrawals, the Department of the Interior should never have permitted contests. However, at the time of the contest in question. there is no doubt but that under the instructions governing the conduct of that department such contests were allowed. With the wisdom or policy of permitting such contests,

of course, this court has no concern. In the event of the successful termination of such contest, under the Statute of 1880 the contestant, as above referred to, was entitled to a preferential right of entry. This right must needs have been made use of by him within thirty days after notice of the successful termination of his contest. A withdrawal of the lands involved in a contest under the 'first form' of the Reclamation Act, however, served to exclude such land so withdrawn from entry. In contemplation of law it had then, temporarily or permanently, been taken over for public and governmental purposes. In the event of its being taken over permanently, that is, in the event of the completion of the reclamation project as originally conceived and the actual use of the land for the public purpose contemplated in the original withdrawal, the contestant would, of course, have lost his preferential or any other right of entry; but it must be assumed that he instituted his contest with such possibility in mind. In the event, however, that it should be discovered, as it was in this case, that the withdrawal was unnecessary,—that the original intention to use the withdrawn lands could not for some reason be consummated,—and the land should thereafter be restored to the public domain, subsequent entry, as between the contestant who had a preferential right and the entryman whose claims to the land had, after due investigation, been denied, should be given to the one who had done everything in his power, presumably, to comply with the laws of the United States, rather than to one who, presumably, under the findings and

judgment of the Interior Department, had failed to comply with such laws.

In other words, having initiated a contest and having proven to the satisfaction of those given jurisdiction to hear it that his contest was well founded, the contestant, under the statute, had a right to enter the land as for himself. This right he must exercise within thirty days after notice of a decision in his favor. This right, however, though a substantial one, was denied to him because of the withdrawal of the land by superior authority—the government of the United States. Upon the land reverting to the public domain and upon its thereafter becoming subject to entry, there would seem to be good reason for holding that the preferential right theretofore awarded by statute to the contestant should then inure to him. At all times after a determination of his contest in his favor, presumably, he was ready, willing and anxious to make his entry. He was prevented from so doing by the action of the government. There can be no impropriety, then, in according to him a substantial recognition of this right as soon as it had been definitely determined that the government no longer had claims upon the land. In my judgment the action of the department in holding that the right accrued as of the date of restoration of the land to the public domain was a correct application of the law in the premises.

Many facts are alleged by plaintiff tending to show that he was unjustly 'contested' out of his land. Obviously, with these matters, this court has nothing to do. A tribunal has been set up by the government,

competent and efficient, to determine these controversies. This court must, as it does, assume that the determinations of such tribunal are proper and supported by sufficiently persuasive and controlling facts.

The motion to dismiss on the ground that the complaint does not state a cause of action is granted.

April 16th, 1917."

In addition to the reasoning set out in the opinion of the Honorable District Court hereinbefore quoted, as appears from plaintiff's amended complaint, he appealed to the highest authority to whom was committed the authority to determine the right to the land. There is no allegation that he did not have his day in court in each of these departments provided by the government for the determination of the issue. The attack of appellant seems to be on the regulations of the Land Department, which, as we shall hereafter show, were made under the authority of an Act of Congress; and it is well settled that such regulations under authority of Congress have in the proper sense the force of law.

U. S. v. Eaton, 144 U. S. 677;
Com. v. Crane, 158 Mass. 219;
Smith v. Shakopee, 103 Fed. R. 241.

We therefore submit the appellee's points on the merits of the amended bill briefly under four heads with the citations of authorities in support of the propositions.

1. A decision rendered by the officers of the Land Department upon questions of fact, or mixed questions

of law and fact, is conclusive and not subject to be reviewed by the courts except by clear showing of fraud, or the entire lack of evidence.

Ross v. Day, 232 U. S. 110;
Whitcomb v. White, 214 U. S. 15;
Shepley v. Cowan. 91 U. S. 330;
Quinby v. Conlan, 104 U. S. 420;
Burfening v. Ry. Co., 163 U. S. 321;
Marquez v. Frisbie, 101 U. S. 473 (this case is particularly in point where there is a mixed question of law and fact);
King v. McAndrews *et al.,* 111 Fed. 860 (this case is especially strong in its reasoning, and the citation of many authorities, and is an opinion of the Circuit Court of Appeals, the 8th Circuit).

The case of Emmons v. U. S., 175 Fed. 514, is a very decisive opinion by Judge Wolverton while sitting in the Circuit Court of the District of Oregon.

In the case of Quinby v. Conlan, 104 U. S. 420, Judge Field, speaking for the court, said:

> "And where fraud and misrepresentations are relied upon as grounds of interference by the court they should be stated with such fulness and particularity as to show that they must necessarily have affected the action of the offcers of the department. Mere general allegations of fraud and misrepresentations will not suffice. United States v. Atherton, 102 U. S. 372."

In the case at bar the allegations of fraud are too general. They amount to nothing in the way they are

attempted to be plead. The amended bill of complaint is an attack upon the high officers of one branch of the government, and the allegations, within all of the decisions mentioned, are not sufficient.

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2. The government had authority to allow the appellee to exercise his preferential right within thirty days after notice that the land was restored to entry.

Under this proposition we call attention to the fact that where a period of time is fixed by statute or a court for the performance of any act, and the government or state whose statute is relied on, or the court whose rule is referred to, places some obstacle in the way which prevents the performance of the act within the time prescribed, then the time is extended over the period of the obstacle. This was the rule at common law, and most states have a statute upon the subject. As it appears, after the defendant had justly earned his preference right by a long series of contests, the government, of its own accord, and exercising its superior right in such matters, withdrew the land from settlement, during which time the appellant was not permitted to exercise the right given him by the Act of May 4, 1880 (21 Stat. 140).

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3. Where an executive department of the government exercises certain powers and renders certain decisions for a certain period of years, Congress having power to legislate on the subject, is held to have acquiesced in the action of the executive department.

U. S. v. Midwest Oil Co., 236 U. S. 459.

Therefore, we call attention to a long list of decisions of the land department which sustain the right of the Land Department in the case at bar to permit appellee to file on the land after the expiration of the thirty days provided for by the Act of 1880, *supra,* and when it was impossible for the appellee to make settlement by reason of an act of the government in withdrawing the land.

Fairchild v. Eby, 37 Land Dec. 362;
Wright v. Francis *et al.,* 36 Land Dec. 499;
Beach v. Hansen, 40 Land Dec. 607;
Wells v. Bodkin, 42 Land Dec. 340;
Edwards v. Bodkin, 42 Land Dec. 172;
Re Joseph F. Gladeux, 41 Land Dec. 286.

We call particular attention to the regulations of the Land Department found in 42 Land Dec., commencing at page 365. These regulations, as shown by section (1) thereof, were promulgated under the authority of the "Reclamation Act" of June 17, 1902; and section 26 of these regulations, found on page 370 of Vol. 42, Land Decisions, provides for just such cases as the case at bar, that is, the successful contestant might exercise his right within thirty days from notice that the lands had been restored to public domain. This is exactly what the appellee did in the case at bar.

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4. As an absolute authority sustaining the action of the Land Department we call special attention to the Act of Congress of June 17, 1902, hereinbefore referred to, known as the "Reclamation Act," particularly

section (3) of said Act (32 Stat. 388), and also section (10) of said Act, which expressly authorizes the Secretary of the Interior to make such rules and regulations as shall be necessary and proper for the purpose of carrying the Act into full force and effect.

The order of the Secretary of the Interior withdrawing, under this "Reclamation Act," the lands in this controversy, was issued September 12, 1903; and thereafter, on June 6, 1905, the Secretary of the Interior, in pursuance of the power given him by section (10) of the "Reclamation Act," promulgated the following rules:

> "Sixth. Any entry embracing lands included within any withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and cancelled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest, will be awarded a preferred right of making entry under the Reclamation Act, provided the lands involved are not embraced within a withdrawal of the first form.
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> "Seventh: When any entry for lands embraced within a withdrawal under the first form is cancelled by reason of contest or for any other reason, such land becomes subject immediately to such withdrawal and cannot thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may

exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

Finally, and we might say as a fifth proposition, it may be said that where the government, under an Act of Congress and the rules and regulations of the Land Department, had granted to the appellee a valuable right which he had acquired by the expenditure of time and money over a series of years in winning his contest, and conceding that the government's right in public land is superior, no one could deprive the appellee of this right. There is authority for this position found in the case of James *et al.* v. Germania Iron Co., 107 Fed. 602, an opinion by Judge Sanborn of the Circuit Court of Appeals, citing authorities.

It is very respectfully submitted that there is no merit whatever in the plaintiff's amended complaint, and it is therefore respectfully submitted that if this Honorable Court should see fit to consider the merits of the amended bill, that the judgment of the Honorable District Court in sustaining the demurrer should be sustained.

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